
No. 9073

11

United States
Circuit Court of Appeals
For the Ninth Circuit

PUGET SOUND NAVIGATION COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT

This is an action at law by the appellee, United States of America, against appellant Puget Sound Navigation Company, to recover \$5,307.93 (Tr. 37) for "overtime" services of inspectors and employees of the Immigration Service pursuant to Secs. 1, 2 of Chap. 368 of the Act of March 2, 1931, 46 Stat. 1467, Title 8, U. S. C., Secs. 109a, 109b (Appendix A), in connection with examination and landing of passengers from the appellant's vessels at Puget Sound ports from Victoria and Sidney, B. C. The appellant denies liability, claiming its vessels to be "international ferries" and thus exempt by reason of the following proviso contained in Sec. 2 of the Act, reading as follows:

“Provided, That this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules.”

The district court held that the vessels were not “international ferries” and this is an appeal from a judgment in favor of the appellee (Tr. 13).

JURISDICTION

The jurisdiction of the district court is believed to be sustained by Sec. 24 of the Judicial Code, Title 28, U. S. C., Sec. 41(1). The jurisdiction of this court is believed to be sustained by Sec. 128 of the Judicial Code, Title 28, U. S. C., Sec. 225.

STATEMENT OF THE CASE

This case was tried to the court without a jury on an agreed stipulation as to the facts (Tr. 15). The district court filed a memorandum decision (Tr. 41) (24 F. Supp. 431) and made and entered findings of fact and conclusions of law (Tr. 48).

The appellant is the owner and operator of a large number of vessels of the United States operating on regular schedules in international and intrastate ferry service on Puget Sound and adjacent waters (Tr. 20). The various routes are shown on United States Coast and Geodetic Survey Map No. 6400 (Ex. 51; Tr. 20), on which exhibit the black lines indicate highways; the red lines indicate international routes involved in this action; the blue lines indicate intrastate extensions of

international routes involved in this action, and the green lines indicate intrastate routes (Tr. 20, 21).

The "overtime" services involved were furnished in connection with international routes involving the examination and landing of passengers embarking at Victoria and Sidney, both on Vancouver Island (the only two foreign ports served) during the years 1931 to 1935, inclusive.

The international routes and vessels involved may for convenience be described as follows:

Route 1—Victoria-Port Angeles-Port Townsend-Seattle (IROQUOIS).

Route 2—Victoria-Port Angeles (IROQUOIS and OLYMPIC).

Route 3—Victoria-Bellingham (OLYMPIC).

Route 4—Victoria-Edmonds (OLYMPIC).

Route 5—Sidney-Orcas-Anacortes (CITY OF ANGELES, ROSARIO, PUGET).

Route 6—Sidney-Friday Harbor (CITY OF ANGELES, ROSARIO, PUGET).

Route 7—Sidney-Friday Harbor-Anacortes (CITY OF ANGELES, ROSARIO, PUGET, CITY OF BREMERTON, QUILCENE), (Tr. 15-19).

Each of the mentioned vessels were likewise variously operated on intrastate ferry routes (Tr. 22-25).

Route 1 is a daily all-year schedule operated from Seattle to Port Townsend to Port Angeles to Victoria and return from Victoria to Port Angeles to Port Townsend to Seattle. "Overtime" services were rendered at

Port Angeles on the return schedule (Tr. 15). The distance between Victoria and Port Angeles is 20.75 miles (Tr. 36), running time ninety-five minutes (Exs. 1-50; Tr. 19). Route 2 is a daily summer schedule operated between Victoria and Port Angeles, except in 1934 (Tr. 15-17). Route 3 is a daily summer schedule operated between Victoria and Bellingham in 1931, 1932 (Tr. 16). The distance between Victoria and Bellingham is 60 miles (Tr. 36), running time four hours (Exs. 4-7, 13-17; Tr. 19). Route 4 is a daily summer schedule operated between Victoria and Edmonds in 1935 (Tr. 17). The distance between Victoria and Edmonds is 66.4 miles (Tr. 36), running time four and a half hours (Exs. 46-48; Tr. 19). Route 5 is a daily summer schedule operated from Anacortes via San Juan Island points to Sidney and return via Orcas in 1931, 1932 (Tr. 17-18). "Overtime" services were rendered at Sidney and Anacortes on the return schedule (Tr. 17, 18). No claim was made for such "overtime" at Sidney in 1932 (Tr. 18). The distance between Sidney and Orcas is 28.9 miles (Tr. 37), running time one and three-quarters hours (Exs. 4-7; Tr. 19). Route 6 is a daily summer schedule operated from Anacortes via San Juan Island points to Sidney and return to Friday Harbor in 1931, 1932 (Tr. 17, 18). "Overtime" services were rendered at Sidney, but no claim was made for such "overtime" in 1932 (Tr. 18). The distance between Sidney and Friday Harbor is 21.7 miles (Tr. 37), running time one and three-quarters hours (Exs. 4-7, 13-17; Tr. 19). Route 7 is a daily summer schedule operated from Bellingham or Anacortes via San Juan Island points to Sidney and return to Anacortes via Friday Harbor (Tr. 18, 19). This was changed to

an all-year service in 1934 (Tr. 19). "Overtime" services were rendered at Anacortes on the return voyage (Tr. 18, 19).

As a result of these schedules there was one arrival of passengers each day at Port Angeles from Victoria in the winter months, one arrival each day during the summer months of 1934, two arrivals a day during the summer months of 1931 and 1935, and three arrivals a day during the summer months of 1932 and 1933 (Tr. 15, 16, 17). There was one arrival of passengers each day at Bellingham from Victoria in the summer months of 1931 and 1932 (Tr. 16). There were two arrivals of passengers each day at Edmonds from Victoria during the summer months of 1935 (Tr. 17). There was one arrival each day of passengers at Orcas from Sidney in the summer months of 1931 and 1932 (Tr. 17, 18). There were two arrivals of passengers each day at Friday Harbor from Sidney in the summer months of 1931 to 1935, both inclusive, and one arrival per day during the winter months of 1934-1935 (Tr. 17, 18, 19).

The only question presented is whether or not the vessels, or any of them, on the international routes, or any of them, are "international ferries." If so, and to the extent that it be so, the judgment appealed from should be reversed.

SPECIFICATION OF ERRORS

The appellant specifies and relies on each of the following errors:

1. That the district court erred in entering judgment

for the appellee and against the appellant (Tr. 57, 58, 68, 69).

2. That the district court erred in making and entering its findings of fact and conclusions of law in favor of the appellee (Tr. 57, 58, 68, 69).

3. That the district court erred in denying appellant's motion for special findings and conclusions, or in the alternative for judgment in its favor (Tr. 57, 58, 68, 69).

4. That the district court erred in finding and concluding and in entering judgment accordingly, that the operation of the vessels, and each of them, on the routes, and each of them, and on the schedules, and each of them, and at and on the days, and each of them, and at the ports, and each of them, in connection with which overtime of immigration inspectors was rendered, did not constitute the operation of an international ferry or ferries exempted from liability for payment for such overtime service pursuant to the proviso of the Act of Congress of March 2, 1931, Sec. 2, 46 Stat. 1467, Title 8, U. S. C., §109b (Tr. 57, 58, 68, 69).

5. That the district court erred in failing to find and conclude and in failing to enter judgment accordingly, that the operation of the vessels, and each of them, on the routes, and each of them, and on the schedules, and each of them, and at and on the days, and each of them, and at the ports, and each of them, in connection with which overtime of immigration inspectors was rendered, constituted the operation of an international ferry or ferries exempted from liability for payment for such overtime service pursuant to the proviso of the Act of

Congress of March 2, 1931, Sec. 2, 46 Stat. 1467, Title 8, U. S. C., §109b (Tr. 57-59, 68-70).

6. That the district court erred in making its finding of fact No. V (Tr. 50) that the vessels were engaged in the unrestricted transportation of passengers and all manner of transportable property (Tr. 54-59, 68-70).

ARGUMENT

Inasmuch as there is but one question involved in this appeal, namely, whether or not the vessels, or any of them, on the routes, or any of them, are international ferries within the meaning of the *proviso*, all the specifications of error will be discussed under this one heading, to-wit:

THE VESSELS, AND EACH OF THEM, ON THE INTERNATIONAL ROUTES, AND EACH OF THEM, ARE INTERNATIONAL FERRIES AND OPERATED AS SUCH

In *Canadian Pac. Ry. Co. v. United States*, 73 F. (2d) 831, 832, 835, this court held that the five "Princess Liners" of the Canadian Pacific Railway Company, ranging from 3,060 gross tons to 5,875 gross tons (see pictures, Exs. 90, 91, 92, 97; Tr. 35), and engaged in a triangular service between Vancouver, Victoria and Seattle (145 miles direct and 164 miles via Victoria) (Ex. 98; Tr. 35) were not "international ferries."

This court said in reference to the words "international ferries," as used in the *proviso*:

" * * * in arriving at the legislative intent in the use of these words, assistance by way of analogy

may be derived from definitions and decisions as to what ordinarily constitutes a 'ferry.' We must also have in mind the purpose of the enactment, the character of the service rendered, the length of the run, the place or locality served, and the manner in which the trips of the vessels in question are made."

After discussing various definitions of the term "ferry" and the necessity for a franchise, this court concluded:

"We think the distance traveled too great, the elapsed time too long, to permit appellant's boats to fall within the definition of a 'ferry'."

and quoted with approval from the language used by Judge Neterer in the district court in part as follows:

"It is obvious from the conventional seagoing construction of the vessels, the character of the service rendered, and absence of compliance or attempt to comply with local ferry laws, the defendant was not and is not operating the vessels in issue as an international ferry, and therefore within the exception, section 109b, Title 8, U. S. C. A.
* * *"

In order to apply this decision to the routes and vessels in question, reference will be made to further facts, as required.

1. PURPOSE OF THE STATUTE

This court, in the *Canadian Pacific* case, said:

" * * * the purpose of the statute was to have ocean-going vessels pay extra compensation for the services of the United States Immigration Inspectors after 5 p. m., the same as is paid in the Customs Service, and there was no intent by the proviso to change the purpose of the bill in its application to general steamship lines."

In further reference to this subject, it is stated in error:

“ * * * the provisions of exemption in the Customs Overtime Act are almost identical with the act here under discussion.”

There is no similar exemption or proviso in the Customs Overtime Act, Title 19, U. S. C., §267.

We believe it to be evident that it was the intention of the *proviso* to exempt all regular established service across the border so that the Act would apply as intended only to ocean service. In the debate on June 16, 1930, relating to the *proviso*, appears the following:

“MR. STAFFORD: ‘ * * *. I wish this law to apply to ocean steamers, and I want to limit it to ocean traffic conditions.’

“MR. CRAMPTON: ‘ * * *. If we have an amendment that the provisions of this act relating to extra compensation shall not apply to international bridges or ferries or railroad trains operating on regular schedules, it would seem to me that would reach the whole thing.’

“MR. STAFFORD: ‘Not only the railroad train crossing the border is concerned *but any regular established service across the border*, and these men should not be privileged to exact two and one-half times their salary for just an hour’s additional work. *It is only intended to apply to ocean service and that is the main consideration.*’ (Congressional Record, 10908).

“ ‘ * * * .

“MR. LAGUARDIA: ‘*Mr. Speaker, I want to ask the gentleman from Wisconsin if the purpose of the gentleman’s amendment is to eliminate the extra time,*

particularly on the border, where the regular schedule is in operation?

“MR. STAFFORD: ‘That is the purpose.’

“MR. LAGUARDIA: ‘There is nothing in the amendment which in any way changes the purpose of the bill in its application to general steamship lines?’

“MR. STAFFORD: ‘No.’ (Congressional Record, 10909).”

We believe that it may readily be demonstrated that the international ferry routes operated by the appellant are in fact “international ferries” and not the operation of sea-going vessels as a general steamship line or lines. As previously stated, each of the vessels operated on international ferry routes were likewise variously operated on intrastate ferry routes (Tr. 22-25). As will be further developed later, the character of the service rendered, the length of the run, the place or locality served and the manner in which the trips are made are substantially similar on both the international and intrastate routes operated by the appellant.

In the *Canadian Pacific* case, in describing the vessels and service there involved, this court quoted with approval the following language of Judge Neterer in the district court:

“The vessels are of the ocean liner type, with a deck arrangement for automobiles with other cargo, all embarking and debarking at the side port or gangway. The spacious dining room service and berths and sleeping apartments indicate comfort and service other than ferry service. A ferry is a service of necessity, for the common good, to reach a point across a stream, lagoon or lake, or bay. The service of the vessels in issue predominates in no such

service, but rather offers a privilege to view the scenic beauties * * * and give, instead of a ferry service, a delightful scenic service and service competitive—not necessary—with the almost parallel line of the railway and the Pacific Highway, a public thoroughfare between Seattle and Vancouver, B. C., for a distance of approximately 145 miles. Nor does the service furnish a connecting link for highway traffic. * * *.”

In the same decision by Judge Neterer in the district court, *United States v. Canadian Pac. Ry. Co.*, 4 F. Supp. 851, 852, in referring to the international routes here involved (other than Routes 3 and 4, the latter being inaugurated subsequent to the decision), but in error referring to them as being operated by the Canadian Pacific Railway Company, it is stated:

“ * * *. The defendant is operating regular ferry lines between Nanaimo and Vancouver, *Sidney* and *Anacortes*, *Victoria* and *Port Angeles*, but on these ferry routes the conventional open-end type of ferryboats are used.” (Italics ours).

And again referring to all of the international routes here involved (except Route 4, subsequently established), it is stated:

“ * * *. The Puget Sound Navigation Company operates an international passenger, etc., ferry service, but its vessels are all built upon the conventional ferryboat lines, with open end for embarking and debarking automobiles and passengers.”

2. THE CHARACTER OF THE SERVICE RENDERED

(a). *The Routes.*

Vancouver and Sidney are located on Vancouver Island (Ex. 51; Tr. 20). Obviously, a ferry service be-

tween Victoria and Port Angeles, the largest city on the Olympic Peninsula on the south, a distance of 20.75 miles, is a service of necessity. No highways are paralleled and connection is made with the highways on Vancouver Island and those on the Olympic Peninsula. Likewise a ferry service between Victoria and the mainland, Bellingham to the east, the largest city on the mainland north of Seattle, a distance of 60 miles, and to Edmonds on the south (which is likewise the northern terminal for ferry service between Seattle and Olympic and Kitsap Peninsula points), a distance of 66.4 miles, are services of necessity. No highways are paralleled and connections are made with the highways on Vancouver Island and those on the mainland. Likewise a ferry service between Sidney and the San Juan Islands to the east via Orcas on Orcas Island, a distance of 28.9 miles, or via Friday Harbor on San Juan Island, a distance of 21.7 miles, are services of necessity. No highways are paralleled and connections are made with the highways on Vancouver Island and those on both Orcas Island and San Juan Island. The international routes here involved furnish the foregoing ferry services (Tr. 15-19).

(b). *The Length of the Run.*

The distance between Victoria and Port Angeles is 20.75 miles, between Victoria and Bellingham 60 miles, between Victoria and Edmonds 66.4 miles, between Sidney and Orcas 28.9 miles, and between Sidney and Friday Harbor 21.7 miles (Tr. 36, 37). The distance traveled by ferry must of necessity vary with the geography of the area and greater distances must of

necessity be traversed between points on Puget Sound and adjacent waters than in more restricted areas (Ex. 51; Tr. 20). On the intrastate ferry routes operated by appellant the distances vary from 1.1 mile to 71 miles; the distance between Shaw Island and Orcas in the San Juan Islands is 1.1 mile; the distance between Seattle on the mainland and Port Angeles on the Olympic Peninsula is 71 miles (Tr. 36, 37). Between these extremes the distances vary. Without listing all the points covered in intrastate service, the following is illustrative: between Seattle on the mainland on the one hand and each of the following points, the distances are as follows: Port Townsend on the Olympic Peninsula, 43.75 miles; Bremerton on the Kitsap Peninsula, 15.5 miles; Suquamish on the Kitsap Peninsula, 12 miles; Manchester on the Kitsap Peninsula, 10.13 miles; Port Blakely on Bainbridge Island, 8.25 miles; and between Edmonds on the mainland to Port Townsend on the Olympic Peninsula, 28 miles (Ex. 51; Tr. 20, 36, 37).

The term "ferry" has not been as narrowly defined in this country as in England, possibly due to the presence of larger bodies of water than were common in England. As stated in *Broadnax v. Baker* (1886), 94 N. C. 675, 55 Am. Rep. 633:

"It has now a wider application, and has been sometimes used to designate transportation over a wide expanse of water, the essential idea of passing from one shore to an opposite shore being retained."

The broader definition of the American courts is also reflected in the statutory definition of the California Political Code, Sec. 3643, in which a ferry is defined as:

“A vessel traversing across any of the waters of the State between two constant points regularly employed for transfer of passengers and freight, authorized by law to do so * * *.”

In none of these definitions of “ferry” is there any limitation upon the size of the body of water crossed. By the very nature of the service required of a ferry there could be no arbitrary limitation.

(c). *The Vessels Used.*

The majority of the ferry vessels operated on Puget Sound are rebuilt combination freight and passenger or passenger vessels, reconstructed so as to carry vehicles on the car or main deck (Tr. 27). A vessel may be classed by the Department of Commerce as a ferry vessel, as distinguished from a passenger vessel, if it has the required number of water-tight bulkheads or air tanks required by the Department’s regulations (Tr. 27-30). Without analyzing in detail the difference in the regulations applicable to ferry vessels as distinguished from passenger vessels, it is sufficient to say that because of the greater buoyancy of ferry vessels they are required to have less in the way of auxiliary life saving equipment than are passenger vessels. A vessel for which an owner may secure a certificate of inspection as a ferry may likewise be certificated as a passenger vessel.

Exhibits 70 to 78, inclusive, are pictures of various vessels not directly here involved, some of which are certificated as ferry vessels and others as passenger vessels and these vessels are operated in intrastate service on the various routes shown on Exhibit 51 (Tr.

20, 26). All of these vessels, as do the vessels here directly involved, have lunch counter and dining table service for passengers (Tr. 26). These vessels vary in type from the single-end to double-end ferries and from simple to stream-line construction (Ex. 78; Tr. 26). These vessels, as do the vessels here directly involved, have in common a construction with a main or car deck without cargo holds (Exs. 71, 78; Tr. 26). They are thus distinguished in physical construction from the usual passenger or combination freight and passenger vessel, such as the Steamer TACOMA (Ex. 68; Tr. 26), which vessel is similar in type to the "Princess Liners" involved in the *Canadian Pacific* case (Exs. 91, 92, 97; Tr. 35). These vessels and the vessels directly here involved are likewise thus distinguished from freight vessels such as the ALOHA (Ex. 69; Tr. 26), and the COMMANCHE (Ex. 69a; Tr. 26).

There are seven vessels that are here directly involved. The IROQUOIS is 1,767 gross and 1,202 net tons. The vessel was originally built as a combination freight and passenger vessel and in 1928 was reconstructed as a typical single-end Puget Sound ferry, vehicles being driven on and off the car or main deck through an opening in the bow which may be closed by means of sliding doors (Tr. 21). The vessel is certificated as a passenger vessel (Ex. 55; Tr. 22). Exhibit 52 is a side view of the vessel; Exhibit 52a a side and bow view, Exhibit 53 a bow view showing a car being driven off at the ferry slip, Exhibit 53a is a side and bow view showing the open bow as the vessel approaches the ferry slip, and Exhibit 54 is a view of the car deck. These pictures disclose a typical single-end Puget Sound ferry (Tr. 21-22).

The OLYMPIC is 1,303 gross and 896 net tons. The vessel was originally built as a combination freight and passenger vessel and in 1924 was reconstructed as a typical single-end Puget Sound ferry, vehicles being driven on and off the car or main deck through an opening in the bow which may be closed by means of sliding doors (Tr. 22). The vessel is certificated as a passenger vessel (Ex. 57; Tr. 22). Exhibit 56 is a side and bow view of the vessel with the sliding doors closed, Exhibit 56a is a similar view with the bow open. These pictures disclose a typical single-end Puget Sound ferry (Tr. 22). During the period in question in the list of vessels of the United States published by the Department of Commerce pursuant to the Act of July 5, 1884, this vessel was stated to be in the "ferry" service (Tr. 22).

The PUGET is 188 gross and 128 net tons. The vessel was originally built as a combination freight and passenger vessel and in 1923 was reconstructed as a typical double-end Puget Sound ferry (Tr. 23). The vessel is certificated as a passenger vessel (Ex. 59; Tr. 23), but an inspection of Exhibit 58 discloses a typical small double-end Puget Sound ferry (Tr. 23). During the period in question in the list of vessels of the United States published by the Department of Commerce pursuant to the Act of July 5, 1884, this vessel was stated to be in the "ferry" service (Tr. 23).

The QUILCENE is 401 gross and 272 net tons. The vessel was originally built as a passenger vessel and in 1926 was reconstructed as a typical single-end Puget Sound ferry (Tr. 23). The vessel is certificated as a pas-

senger vessel (Ex. 61; Tr. 24), but an inspection of Exhibit 60 discloses a typical small single-end Puget Sound ferry (Tr. 23). During the period in question in the list of vessels of the United States published by the Department of Commerce pursuant to the Act of July 5, 1884, this vessel was stated to be in the "ferry" service (Tr. 24).

The CITY OF ANGELES is 442 gross and 347 net tons. The vessel was originally built as a yacht and in 1926 was reconstructed as a typical single-end Puget Sound ferry (Tr. 24). The vessel is certificated as a "ferry" (Ex. 63; Tr. 24) and an inspection of Exhibit 62 discloses a typical small single-end Puget Sound ferry (Tr. 24). During the period in question in the list of vessels of the United States published by the Department of Commerce pursuant to the Act of July 5, 1884, this vessel was stated to be in the "ferry" service (Tr. 24). In view of the fact that this vessel is certificated as a "ferry," attention is directed to the similarity in construction to the IROQUOIS (Exs. 52, 52a, 53, 53a, 54; Tr. 21); OLYMPIC (Exs. 56, 56a; Tr. 22), and QUILCENE (Ex. 60; Tr. 23).

The ROSARIO is 290 gross and 197 net tons. The vessel was originally built as a combination freight and passenger vessel and in 1931 was reconstructed as a typical double-end Puget Sound ferry (Tr. 25). The vessel is certificated as a "ferry" (Ex. 65; Tr. 25) and an inspection of Exhibit 64 discloses a typical small double-end Puget Sound ferry (Tr. 25). During the period in question in the list of vessels of the United States published by

the Department of Commerce pursuant to the Act of July 5, 1884, the vessel was stated as being in the "ferry" service (Tr. 25). In view of the fact that this vessel is certificated as a "ferry" attention is directed to the similarity in construction to the PUGET (Ex. 58; Tr. 23).

The CITY OF BREMERTON is 510 gross and 346 net tons. The vessel was originally built as a combination freight and passenger vessel and in 1921 was reconstructed as a typical single-end Puget Sound ferry (Tr. 25). The vessel is certificated as a "ferry" (Ex. 67; Tr. 26) and an inspection of Exhibit 66 discloses a typical small single-end Puget Sound ferry (Tr. 25). During the period in question in the list of vessels published by the Department of Commerce pursuant to the Act of July 5, 1884, the vessel was stated to be in the "ferry" service (Tr. 25, 26). In view of the fact that this vessel is certificated as a "ferry," attention is directed to the similarity in construction to the IROQUOIS (Exs. 52, 52a, 53, 53a, 54; Tr. 21), OLYMPIC (Exs. 56, 56a; Tr. 22) and QUILCENE (Ex. 60; Tr. 23).

(d). *The Franchise.*

There is no law of the United States or of the State of Washington requiring a franchise for the operation of a "ferry" on an international route. With certain exceptions not here material a certificate of public convenience and necessity must be obtained for the operation of any vessel or ferry for the public use for hire in intrastate commerce in the State of Washington, Chap. 248, Laws of 1927, p. 382, Sec. 1, Rem. Rev. St. 10361-1 (Appendix B). The appellant is the

holder of such certificates of public convenience and necessity from the Department of Public Service of Washington covering the intrastate routes shown on Exhibit 51 (Exs. 79-84; Tr. 32). These certificates of public convenience and necessity include both Victoria and Sidney, which is accounted for by the fact that on some of the international routes here involved there are intrastate extensions. The red lines on Exhibit 51 indicate the international routes involved in this action and the blue lines indicate the intrastate extensions thereof where there are such extensions (Tr. 20, 21).

(e). *The Intrastate Extensions.*

On Route 1 from Victoria to Port Angeles the route continues to Port Townsend and Seattle. On Route 5 from Sidney to Orcas, the route continues to Lopez Island and Anacortes. On Route 7 from Sidney to Friday Harbor, the route continues to Orcas, Lopez Island and Anacortes (Tr. 15, 18, 19; Ex. 51; Tr. 21). This does not affect the nature of the ferry service on Route 1 from Victoria to Port Angeles, on Route 5 from Sidney to Orcas, nor on Route 7 from Sidney to Friday Harbor.

Much the same situation as to route was presented in *City of New York v. New Jersey Steam-Boat Transp. Co.*, 106 N. Y. 28, 12 N. E. 435 (1887) where the defendant operated vessels adapted to carry travelers with their horses, vehicles and other property from Manhattan Island to Bayou, New Jersey, thence to West Brighton, Port Richmond, Elm Park, all on Staten Island, thence to Elizabeth Port, New Jersey, and return via the same ports, the round trip being about 24 miles. The court, in holding this to be a ferry operation, said:

“The business of the defendant did not lose its character as a ferry business because its boats, in their passages, stopped at places upon the New Jersey shore as well as at the places upon the Staten Island shore. It was undoubtedly engaged in a ferry business between every point at which its boats touched for passengers and the city. In the carriage of passengers from one place on the New Jersey shore, or the Staten Island shore to other places on the same shore, it was simply doing the business of a common carrier, as its boats did not pass over intervening waters. But in going from the city its boats could leave passengers from the city at each of the places at which they stopped, and so in returning they could take passengers at each of the places and carry them to the city; and in doing this they would be engaged in a ferry business. There is nothing in the nature of a ferry business which requires that a ferry should be operated from but one place upon one shore to a single place upon the opposite shore. There was nothing in the structure of the defendant’s boats which deprived them of the character of ferry-boats. They were adapted to carry travelers, with their horses, vehicles, and other property, and hence they could engage in a ferry business.”

3. THE TRANSPORTATION OF MERCHANDISE

The district court apparently based its decision on the following appearing in its memorandum decision:

“In general, the business was held out to, and did include, not only the carriage of passengers and automobiles with passengers, but also unrestricted transportation of all kinds of transportable property. As to that property the freight charges were not collected only from travelers, as is done in the case of a ferry business, but were collected from either the shippers or consignees. And no business of the vessels was done with particular reference to water

connections between specific overland highways, of which there are many serving the myriad of communities in and about the Puget Sound region. The character of the business done was essentially that of general water borne commerce consisting of all kinds of transportation, covering distances varying from a few to a hundred miles to and from those communities, and conducted upon Puget Sound and its adjacent waters, including the high seas." (Tr. 46, 47).

and upon its finding of fact No. V, reading:

"That the vessels heretofore mentioned were engaged in the unrestricted transportation of passengers and all manner of transportable property, upon the waters and to and from the cities above stated (except in a few instances for reasons other than restricted business classification) all as more fully appears in the stipulation and exhibits heretofore entered into between the parties." (Tr. 50).

The observation that no business of the vessels was done with reference to water connections between specific overland highways does not accord with the facts. The connections with the overland highways is clearly shown on Exhibit 51 (Tr. 20, 21). Each and all of the routes shown on Exhibit 51, whether international or intrastate, connect with highways and are in fact the only connections across the water with the highways (Ex. 51; Tr. 20, 21).

The observation and the finding of fact that the vessels operated on the international routes were engaged in the unrestricted transportation of all manner of transportable property is not in accord with the agreed facts. It is true that between all points on intrastate routes

merchandise (freight) was transported (Tr. 26) and it is further true that the vessel IROQUOIS operating on both Routes 1 and 2 carried a negligible amount of merchandise (freight) between Victoria and Port Angeles (Tr. 27), but on none of the other vessels here involved, operating on any of the international routes here involved, was any merchandise (freight) transported from or to Victoria or Sidney (Tr. 27).

It was apparently the view of the district court that if a vessel operating as a ferry transported merchandise (freight) as distinguished from passengers and vehicles, then what was otherwise a ferry operation ceased to be such. If this be correct, it could in any event only apply to the operation of the vessel IROQUOIS on Routes 1 and 2.

No authority for this position is cited by the district court. The position would appear to be unsound so far as the problem here is concerned. The *proviso* exempts a certain type of operation, namely, "international ferries." The exemption was to take care of passengers arriving on regular means of transportation across the border. The fact that an "international ferry" had merchandise on board being carried as freight would not appear to so change the character of the service within the intent of the *proviso* as to exclude the same from the exemption as to payment of "overtime" to inspectors and employees of the Immigration Service in connection with examination and landing of passengers.

In *Mayor of the City of New York v. Starin* (1887), 106 N. Y. 11, 12 N. E. 631, 632, in referring to the ferry business it is said:

“ * * * they may combine, and usually do combine, with the ferry business the business of a common carrier, carrying freight and merchandise without the presence of the owner or custodian * * * .”

As was hereinabove pointed out, the vessels CITY OF ANGELES, ROSARIO and CITY OF BREMERTON are certificated as “ferry” vessels (Exs. 63, 65, 67; Tr. 24, 25, 26).

R. S. 2792, Title 46, U. S. C., §110, provides as follows:

“Vessels used exclusively as ferryboats carrying passengers, baggage, and merchandise, shall not be required to enter and clear, nor shall the masters of such vessels be required to present manifests, or to pay entrance or clearance fees, or fees for receiving or certifying manifests, but they shall, upon arrival in the United States, be required to report such baggage and merchandise to the proper officer of the customs according to law.”

By reason of the fact that the vessels CITY OF ANGELES, ROSARIO and CITY OF BREMERTON are certificated as “ferry” vessels, they are governed by the provisions of this statute (Tr. 31). It is to be noted that in referring to “ferryboats” they are referred to as “carrying passengers, baggage, and merchandise” which indicates that so far as the statutory law is concerned, the position taken by the district court is likewise unsound. As to those vessels here involved which are not certificated as ferry vessels, they are exempt from entry and the payment of entrance and clearance fees and tonnage taxes pursuant to other provisions of law (Tr. 30, 31).

CONCLUSION

It is respectfully submitted that the operation of the vessels on the international routes, and each of them, here involved is the operation of "international ferries" within both the letter and spirit of the exempting *proviso* and being thus exempt from "overtime" payments the judgment appealed from should be reversed as to each vessel and route.

If this court should be of the opinion that the judgment appealed from is incorrect only in part, then it is respectfully submitted that the judgment should be reversed with instructions to the district court to eliminate from the judgment the "overtime" payments erroneously included therein.

Respectfully submitted,

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APPENDIX "A"

§109a, Title 8, U. S. C. Officers and employees; overtime services; extra compensation; length of working day. The Secretary of Labor shall fix a reasonable rate of extra compensation for overtime services of inspectors and employees of the Immigration Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air, such rates to be fixed on a basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days' pay for Sunday and holiday duty; in those ports where the customary working hours are other than those heretofore mentioned, the Secretary of Labor is vested with authority to regulate the hours of immigration employees so as to agree with the prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for immigration employees or the overtime pay herein fixed. (Mar. 2, 1931, c.368, §1, 46 Stat. 1467).

§109b. Same; extra compensation; payment. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance arriving in the United States from a foreign port to the Secretary of Labor, who shall pay the same to the several immigration officers and employees entitled thereto as provided in section 109a of this title. Such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual inspection or examination of passengers or crew takes place or not: *Provided*, That this section shall not apply to the inspection at designated

ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules. (Mar. 2, 1931, c. 368, §2, 46 Stat. 1467).

APPENDIX "B"

No steamboat company shall hereafter operate any vessel or ferry for the public use for hire between fixed termini or over a regular route upon the waters within this state, including the rivers and lakes and Puget Sound, without first applying for and obtaining from the department of public works* a certificate declaring that public convenience and necessity require such operation: *Provided*, That no certificate shall be required for a vessel primarily engaged in transporting freight other than vehicles, whose gross earnings from the transportation of passengers and/or vehicles, are not more than ten per cent (10%) of the total gross earnings of such vessel: * * *.

*—Now the Department of Public Service of Washington.